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Constitutional Law—Eviction of State's Tenants Necessitates a Limited Hearing According to the State Action Doctrine of the Fourteenth Amendment

Sammy Feldman

produce their books and papers for inspection by a government attorney and to be used in evidence:

> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but *illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.* This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.[69]

The California Supreme Court and the dissenting Justices on the United States Supreme Court were aware of these dangers and tried to avoid them by the means discussed earlier. To study the plurality decision in the instant case after reading *Burr, Boyd* and other early decisions dealing with the privilege against self-incrimination leaves one with an overwhelming feeling of nostalgia—"a wistful yearning for something past or irrecoverable."[70]

BARRY BASSIS

CONSTITUTIONAL LAW—EVICTION OF STATE'S TENANTS NECESSITATES A LIMITED HEARING ACCORDING TO THE STATE ACTION DOCTRINE OF THE FOURTEENTH AMENDMENT

The appellants, Mr. and Mrs. Melvin Fuller, were low-income tenants in a state assisted and supervised, partially tax-exempted, private, limited-profit housing company organized under the Private Housing Finance Law.[1] Pursuant to section 44-a of that law, the Ebbets Field Housing Company, Inc.,[2] leased 20% of its units to the State Housing Finance Agency[3] which sublet these units at a low rental, made possible by rental subsidies, to

69. *Id.* at 635 (emphasis added).

70. THE NEW MERRIAM-WEBSTER POCKET DICTIONARY 340 (1964).

1. N.Y. PRIV. HOUS. FIN. LAW §§ 10-37 (McKinney 1962).

2. The housing project was constructed by the Ebbets Field Housing Company, organized pursuant to sections 10-37 of the N.Y. Private Housing Finance Law, for middle-income occupancy.

3. N.Y. PRIV. HOUS. FIN. LAW § 43 (McKinney 1962). The New York State Housing Finance Agency [hereinafter referred to as the Agency] is a corporate governmental agency, constituting a public benefit corporation.

qualified low-income tenants. Appellants subleased from the Agency for a term of three years, to June 30, 1969, without the right to renew. On April 24, 1969, over sixty days prior to the expiration of their lease, the Agency, without sufficient reason,[4] notified the Fullers that their lease would not be renewed. Appellants refused to vacate and Urstadt, Commissioner of Housing and Community Renewal, commenced a holdover eviction proceeding[5] which was dismissed on procedural grounds. Subsequently, appellants' article 78 proceeding,[6] instituted to annul respondent's determination denying renewal of the lease, was also dismissed. However, on November 6, 1969, a second eviction proceeding was instituted, and immediately thereafter, the Fullers again commenced an article 78 proceeding, by order to show cause dated November 14, 1969. Appellants contended that the eviction proceeding of the Agency, and its various functions relating to the housing project constituted "state action" within the meaning of the fourteenth amendment of the United States Constitution. They alleged that the due process clause of the fourteenth amendment requires three essential procedures prior to eviction of state tenants: timely notice, a rational reason, and a right to a fair hearing. Respondent, on the other hand, contended that there was an insufficient amount of state involvement, thus making the Fullers' tenancy predominantly private rather than public within the meaning of the fourteenth amendment. The special term ruled in favor of respondent.[7] The Appellate Division, Second Department, affirmed without opinion, with one Justice dissenting, holding that the Fullers' tenancy was predominantly private rather than public and could be denied renewal without an explanation and without a hearing.[8] On appeal, the Court of Appeals, in a 4-3 decision, reversed and remanded to the state agency for a limited hearing. *Held,* where

4. It was not until after the tenants had been notified that they were ineligible and must vacate the apartment, that they were told they had been found undesirable as tenants because their children were disruptive.

5. Under sections 43 and 44-a of the N.Y. Private Housing Finance Law, the Commissioner of the New York State Division of Housing and Community Renewal serves as agent for the State Housing Finance Agency in leasing from the owner and subleasing to persons of low income and helps in the management of the project as it affects the units leased to the Agency.

6. N.Y.R. Civ. Prac. art. 78.

7. 61 Misc. 2d 988, 307 N.Y.S.2d 91 (Sup. Ct. 1970).

8. 35 App. Div. 2d 537, 313 N.Y.S.2d 160 (2d Dep't 1970).

state action is involved, the state's tenants in a limited-profit housing project must be provided with a limited hearing after being advised of reasons for denying renewal. *Fuller v. Urstadt*, 28 N.Y.2d 315, 270 N.E.2d 321, 321 N.Y.S.2d 601 (1971).

The fourteenth amendment of the United States Constitution provides, in part, that a state may not deprive any citizen of life, liberty, or property without due process of law.[9] The amendment prohibits any state action contravening the rights guaranteed by the Constitution to state citizens. The courts, however, have consistently refused to formulate a definition of state action.[10] The difficulty in formulating this definition arose because each case differs in the degree of state involvement, thereby necessitating a determination of state action on a case by case basis. This determination is made by considering three elements: the various functions performed by the state; the legislative or statutory purpose of the state; and the amount of state assistance.[11] These three elements are essential criteria in establishing whether a *public-serving function* has been created from the acts performed by the state or its agents.[12]

State action cases may be divided into two categories: first, cases where the state acts in its governmental capacity to serve a public benefit, function or purpose;[13] and secondly, cases in which the state significantly participates in the affairs of private agencies thus making them instruments of the state.[14] With regard to the second category, a critical situation arises in determining the degree of state involvement necessary to transform pri-

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9. U.S. CONST. amend. XIV.

10. Cooper v. Aaron, 358 U.S. 1 (1958); Shelley v. Kraemer, 334 U.S. 1 (1948); Virginia v. Rives, 100 U.S. 313 (1879); *Ex parte* Virginia, 100 U.S. 339 (1879); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957). In *Ex parte Virginia, supra*, the Court expressed that state action can be found when:

> [A] State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. . . . Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law . . . violates the constitutional inhibition; and as he acts in the name and for the State, and he is clothed with the State's power, his act is that of the State.

Id. at 347.

11. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963).

12. Lewis, *supra* note 11 at 1105; *see* Note, 24 WASH. & LEE L. REV. 133 (1967).

13. Miller v. Schoene, 276 U.S. 272 (1928); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

14. Civil Rights Cases, 109 U.S. 3 (1883).

vate action into state action.[15] A private agency may act either in a proprietary or in a governmental capacity. It is in the latter situation that courts have had difficulty in distinguishing whether sufficient state participation in the affairs of a private agency constitutes the existence of state action. In *Simkins v. Moses H. Cone Memorial Hospital,*[16] for example, the respondent hospital was a private, non-profit, charitable corporation that participated in the state and federally assisted Hill-Burton program.[17] The Hill-Burton program provided massive use of public funds designed to effect "a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health."[18] Simkins alleged that the hospital discriminated against all Negro physicians in the use of its staff facilities. The court found sufficient state involvement and declared that, "when a State function or responsibility is being exercised, it matters not for Fourteenth Amendment purposes that the [institution actually chosen] would otherwise be private: the equal protection guarantee applies."[19] As *Simkins* demonstrates, the courts must examine the role of the private organization and its actions in light of the degree of state involvement. If the state participation is sufficient to transform the affairs of the agency into a *public function,* then the agency acts as an instrument of the state. As such, the agency must conform to the strictures of the fourteenth amendment. "Significant involvement is that which justifies a finding of a state duty under the amendment to rectify a particular abuse or a finding that to a limited extent a private interest is to be treated as if it were the state."[20]

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15. *Id.* The prohibitions of the fourteenth amendment are against particular acts performed under state authority.

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. . . . It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law . . . .

Id. at 11.

16. 323 F.2d 959 (4th Cir. 1963).

17. 42 U.S.C. § 291 *et seq.* (1970).

18. 323 F.2d at 967.

19. *Id.* at 968.

20. Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent,* 61 COLUM. L. Rev. 1458, 1464-65 (1961). *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Ryan v. Hofstra University, — Misc. 2d —, 324 N.Y.S.2d 964 (Sup. Ct. 1971).

Once state action has been found to exist, procedural due process of law must be afforded to all those affected.[21] The essence of due process is the protection of the individual against any arbitrary or capricious actions by the state.[22] Due process requires that the aggrieved person must receive adequate and timely notice detailing the reasons for all charges,[23] an effective opportunity to defend by confronting and cross-examining all witnesses and by presenting his own arguments and evidence,[24] before a fair and impartial decision maker.[25]

Statutorily, New York recognizes that providing low rent housing for persons of low-income is to be a function of government,[26] and, that the rehabilitation of substandard areas is to be the function of private enterprise aided by government.[27] Since public housing authorities are governmental agencies, their activities must conform with the constitutional mandates of the

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21. Ruffin v. Housing Authority, 301 F. Supp. 251 (E.D. La. 1969).
> The constitutional mandates that require federal and state governments to act only under due process of law mean that no governmental body, no governmental agency, and no governmental officer, state or federal, may deprive a citizen of his life, liberty, or property without observing elementary principles of fair play.

Id. at 252.

22. Morgan v. United States, 304 U.S. 1 (1938):
> But a 'full hearing'—a fair and open hearing—requires more than that. . . . Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

Id. at 18-19. *See In re* Gault, 387 U.S. 1, 31-34 (1967); Wilner v. Committee on Character and Fitness, 373 U.S. 96, 105 (1963); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

23. Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970). In Goldberg v. Kelly, 397 U.S. 254, 262 (1970) the Court noted that termination of appellant's welfare benefits without explanation or a right to a hearing is a violation of one's constitutional rights. The "termination involves state action that adjudicates impartial rights . . . ." In Grannis v. Ordean, 234 U.S. 385, 394 (1914) the Court noted that: "[T]he fundamental requisite of due process of law is the opportunity to be heard."

24. Greene v. McElroy, 360 U.S. 474, 506-08 (1959); *see* Wilner v. Committee on Character and Fitness, 373 U.S. 96, 103-04 (1963).

25. Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292 (1937). The right to a fair hearing "is one of 'the rudiments of fair play' (Chicago, M. & St. P. Ry. Co. v. Polt, 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement." *Id.* at 304-05. *See In re* Murchinson, 349 U.S. 133, 136-37 (1955); Amos Treat & Co. v. SEC, 306 F.2d 260, 263 (D.C. Cir. 1962).

26. N.Y. CONST. art. XVIII; N.Y. PUB. HOUS. LAW § 2 (McKinney 1955).

27. N.Y. PRIV. HOUS. FIN. LAW art. II, § 11 (McKinney 1962).

fourteenth amendment[28] that a citizen may not be deprived of property without due process of law.[29] In *Vinson v. Greenburgh Housing Authority*,[30] the Appellate Division, Second Department, ruled that the Housing Authority, as agent of the state, improperly terminated Vinson's lease without giving a reasonable explanation. Furthermore, the court declared that low rent housing was to be

> permanent and not transitory . . . so long as the tenants remain qualified and do not violate the reasonable regulations of the State agency . . . .[31]

Consequently, the housing statute[32] becomes a part of the lease, and "its spirit and intent must be the guiding beacon in the interpretation of the terms of the lease."[33]

To transmute the activities of a private housing agency into a governmental function necessitates a determination of the existence of state action. This determination of the existence of state action will vary with each case depending upon the use to which the property is put and the extent to which it is publically owned.[34] In making the determination of the requisite amount of state involvement necessary to classify the acts of a housing organization as state action, the courts have considered whether

28. Comment, *Public Landlords and Private Tenants: The Eviction of "Undesirables" From Public Housing Projects*, 77 YALE L.J. 988, 999 (1968): "Public housing authorities are primarily administrative agencies of the government . . . ." *Contra*, Lynch v. United States, 292 U.S. 571, 579 (1934), holding that: "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." Brand v. Chicago Housing Authority, 120 F.2d 786, 788 (7th Cir. 1941), in dictum stated that public housing authorities had the same rights and powers as private landlords: "It is our opinion that this [lease] provision . . . is valid and binding . . . in the same manner as though the lessor had been a private person rather than a Governmental Agency." *Compare*, United States v. National Exch. Bank, 270 U.S. 527, 534 (1926); Reading Steel Casting Co. v. United States, 268 U.S. 186, 188 (1925); Hollerbach v. United States, 233 U.S. 165, 171 (1914); United States v. Smith, 94 U.S. 214, 217 (1876); Cooke v. United States, 91 U.S. 389, 396 (1875).

29. Williams v. White Plains Housing Authority, 62 Misc. 2d 613, 617, 309 N.Y.S.2d 454, 458-59 (Sup. Ct. 1970). *See* Vinson v. Greenburgh Housing Authority, 29 App. Div. 2d 338, 341, 288 N.Y.S.2d 159, 163 (2d Dep't 1968), *aff'd*, 27 N.Y.2d 675, 262 N.E.2d 211, 314 N.Y.S.2d 1 (1970).

30. 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (2d Dep't 1968), *aff'd*, 27 N.Y.2d 675, 262 N.E.2d 211, 314 N.Y.S.2d 1 (1970).

31. *Id.* at 342, 288 N.Y.S.2d at 164.

32. N.Y. PUB. HOUS. LAW § 1 *et seq.* (McKinney 1955).

33. 29 App. Div. 2d at 340, 288 N.Y.S.2d at 163.

34. Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM L. REV. 1458, 1464 (1961); *see* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Brown v. Board of Educ., 347 U.S. 483 (1954); Note, 24 WASH. & LEE L. REV. 133 (1967).

the land was publicly owned or purchased through urban renewal proceedings;[35] whether the building was dedicated for a public purpose; and whether mortgage insurance,[36] tax exemptions, rental subsidies or financial assistance were provided by the federal, state or municipal governments.[37] By virtue of a state putting its property, power, and prestige in the construction and operation of a housing project, the project is brought within the scope of state action and its operators must strictly adhere to the constitutional guarantees of the fourteenth amendment.[38]

Whenever, the state acts as landlord, the relationship is not the ordinary one of a *private* landlord and tenant. "The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law."[39] It follows, therefore, that the housing authority must establish standards and implement regulations pertaining to eligibility and termination of occupancy.[40]

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35. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied,* 339 U.S. 981 (1950). The Court of Appeals held that there was insufficient state involvement to constitute state action under the fourteenth amendment. *Compare* Johnson v. White Plains Urban Renewal Agency, 65 Misc. 2d 293, 317 N.Y.S.2d 899 (Sup. Ct. 1971).

36. McGuane v. Chenango Ct. Inc., 431 F.2d 1189 (2d Cir. 1970) (receipt of mortgage insurance as the only federal benefit did not make the owner an agency of the state). *Contra,* Thorpe v. Housing Authority, 386 U.S. 670 (1967).

37. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 524, 87 N.E.2d 541, 550 (1949) (Fuld, J., dissenting), *cert. denied,* 339 U.S. 981 (1950). Justice Fuld's dissenting rationale was noted in Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083 (1960):

> The affirmative acts and assistance of the city and state indicate a state purpose to provide specific housing for their citizens, the initiative was largely the government's, and tax exemption and eminent domain, both means of furthering public purposes, were used to provide extraordinary assistance to the private companies.

Id. at 1107.

38. Cooper v. Aaron, 358 U.S. 1 (1958). The Court said that "State support . . . through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Id.* at 19. *See* Colon v. Tompkins Square Neighbors, 294 F. Supp. 134 (S.D.N.Y. 1968).

39. Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955); *see* Vinson v. Greenburgh Housing Authority, 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (2d Dep't 1968), *aff'd,* 27 N.Y.2d 675, 262 N.E.2d 211, 314 N.Y.S.2d 1 (1970).

40. The court in Williams v. White Plains Housing Authority, 62 Misc. 2d 613, 309 N.Y.S.2d 454 (Sup. Ct. 1970), held that "[d]ue process requires that not only eviction but also selections for public housing must be made in accordance with reasonable and ascertainable standards." *Id.* at 617, 309 N.Y.S.2d at 459. "Just as in the *Goldberg* case [397 U.S. 254 (1970)] the tenant must have adequate and timely notice detailing the reasons for the proposed termination, and an effective opportunity to defend by confronting and cross-examining any adverse witnesses and presenting his own arguments and evidence orally . . . ." *Id.* at 618, 309 N.Y.S.2d at 460. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968); Colon v. Tompkins Square Neighbors, 294 F. Supp. 134 (S.D.N.Y. 1968).

Escalera v. New York City Housing Authority[41] established procedural guidelines for termination of tenancy in public housing units. Such procedures necessarily include the right to a fair hearing before a tenant review board.[42] To insure a fair hearing, the tenant must be notified of all charges prior to termination, and be given the opportunity to confront and cross-examine all witnesses.[43]

The instant case exemplifies the difficulty in determining the existence of state action in state-aided, but otherwise private housing projects. In determining the existence of state action the court first considered the goals of the New York Private Housing Finance Law.[44] After briefly examining the purpose of the law, the court relied upon *Vinson v. Greenburgh Housing Authority*[45] as controlling. As in *Vinson,* the housing project in the instant case was state-assisted, partially tax-exempted, with the ability to secure state or municipal loans. The maximum rental rates had also been fixed by the state prior to construction.[46] In light of these considerations, the court agreed with Justice Benjamin, dissenting in the appellate division, who noted that:

> [T]he fact remains that in this case . . . it is the public corporation (an instrumentality of the State) [the New York State Housing Finance Agency] that had the power to decide whether petitioners were eligible for an apartment; it is the public corporation that found them eligible and leased the apartment to them at a rental fixed by itself; . . . [and] had the power to decide . . . whether they were eligible for a new lease . . . .[47]

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41. 425 F.2d 853 (2d Cir. 1970).

42. *Id.* at 863.

43. *Id. See also* Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Administrative Procedure Act § 5, 5 U.S.C. § 554 (1966).

44. Fuller v. Urstadt, 28 N.Y.2d 315, 317, 319, 323, 270 N.E.2d 321, 326, 321 N.Y.S.2d 601, 607 (1971) [hereinafter cited as, instant case], *citing* the Public Purpose Papers of Governor Rockefeller, LEGISLATIVE ANNUALS (1964), which declared the purposes of a limited-profit housing development:

> (1) to alleviate the economic and racial stratification found in public housing, (2) to facilitate the movement of low-income families into middle-income housing through rental subsidies, and (3) to permit low-income housing to be undertaken in cooperation with private enterprise.

Id. at 130-32.

45. 29 App. Div. 2d 338, 340-41, 288 N.Y.S.2d 159, 162-63 (2d Dep't 1968), *aff'd,* 27 N.Y.2d 675, 262 N.E.2d 211, 314 N.Y.S.2d 1 (1970). *See* instant case at 319, 321, 323, 270 N.E.2d at 323-24, 321 N.Y.S.2d at 603, 604 (1971).

46. Instant case at 317, 270 N.E.2d at 322, 321 N.Y.S.2d at 602.

47. Fuller v. Urstadt, 35 App. Div. 2d 537, 538, 313 N.Y.S.2d 160, 162 (2d Dep't 1970) (Benjamin, J., dissenting).

The court disregarded the distinction that the state in the instant case had leased rather than owned the building, as in the *Vinson* setting.[48] "The State, through the State agency, is [the Fullers'] only lessor. . . . [Therefore, the Fullers] are entitled to the same treatment as other individuals who are direct subjects of State action . . . ."[49] However, the court did limit its state action analysis to the units rented by the state agency, emphasizing that these units were to be treated as pure *public housing*.[50] Thus, the majority held that the state's involvement was dominant and fell within the scope of the due process clause of the fourteenth amendment.[51] "It is well established that State action in connection with the granting or withholding of services or interests, even if normally extended by private enterprises not subject to regulation, may not be exercised arbitrarily . . . ."[52] To protect against state arbitrariness, a limited hearing consisting of an opportunity to deny or explain the reasons for eviction or termination of occupancy to the project manager must be provided.[53]

The dissent agreed with the majority "that a public housing authority cannot adjudge its tenants ineligible and evict them without at least informing them of the reasons for their ineligibility and affording them an opportunity to reply."[54] However, according to Judge Scileppi, a limited-profit housing project cannot be equated to public housing, but rather is a program to provide adequate middle income housing by encouraging private

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48. Instant case at 318, 270 N.E.2d at 323, 321 N.Y.S.2d at 603: "That the State leases rather than owns the apartments it sublets is of no significance. A post office would be no less a government activity because occupying rented rather than owned premises."

49. *Id.* at 318, 270 N.E.2d at 323, 321 N.Y.S.2d at 603.

50. *Id.* at 317, 270 N.E.2d at 323, 321 N.Y.S.2d at 602.

51. *Id.* at 318-19, 270 N.E.2d at 323-24, 321 N.Y.S.2d at 603-04. The court stated that "where the State 'has so far insinuated itself into a position of interdependence' with a program or project, the program or project 'cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.'" *Id.* at 318, 270 N.E.2d at 323, 321 N.Y.S.2d at 603, *quoting* Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

52. *Id.* at 318, 270 N.E.2d at 323, 321 N.Y.S.2d at 603. *See* Thorpe v. Housing Authority, 386 U.S. 670 (1967); Holmes v. New York City Housing Authority, 398 F.2d 262, 264-65 (2d Cir. 1968); Ruffin v. Housing Authority, 301 F. Supp. 251, 253-54 (E.D. La. 1969); Vinson v. Greenburgh Housing Authority, 29 App. Div. 2d 338, 340-41, 288 N.Y.S.2d 159, 163 (2d Dep't 1968), *aff'd*, 27 N.Y.2d 675, 262 N.E.2d 211, 314 N.Y.S.2d 1 (1970).

53. Instant case at 318, 270 N.E.2d at 323, 321 N.Y.S.2d at 603.

54. *Id.* at 323, 270 N.E.2d at 326, 321 N.Y.S.2d at 607.

investment.[55] Carrying this premise of statutory intent further, the dissent reasoned that the housing project was predominantly private rather than public, since state participation through financing, supervision, and assistance is not sufficient "government participation and involvement so as to warrant the application of procedural due process . . . [and] be equated with 'State action.' "[56] Accordingly, since the program is a mere vehicle to promote private investment into the housing field, " '[t]he State has not here embarked into an area of housing as a function of government.' "[57] If the owner were required to provide a limited hearing for every eviction case, such a procedure would discourage private investors and impose an intolerable burden upon the authority.

In evaluating the rule enunciated in the instant case, it is clear that the scope of the state action doctrine, within the public housing field, has remained unchanged. However, the significance of the instant case is the extension of the state action doctrine, by implication, to the over-all limited-profit housing development. The court was primarily concerned with the contested issue of the units leased by the state and expressly determined that state action existed, by extracting the *public housing units* from an otherwise private, limited-profit housing project. Upon close analysis of the holding, the Court of Appeals implied that the *overall* project was predominantly public rather than private, and thus, would fall within the state action concept of the fourteenth

55. N.Y. PRIV. HOUS. FIN. LAW § 11 (McKinney 1962) provides:
It is hereby declared that there exists in municipalities in this state a seriously inadequate supply of safe and sanitary dwelling[s] . . . for families and persons of low income, . . . that such conditions constitute an emergency and a grave menace to the health, safety, morals, welfare and comfort of citizens of this state, necessitating speedy relief which cannot readily be provided by the ordinary unaided operation of private enterprise and require that provision be made by which private free enterprise may be encouraged to invest in companies regulated by law as to rents, profits, dividends and disposition of their property or franchises and engaged in providing [such] housing facilities . . . for families or persons of low income; . . . that the cooperation of the state, . . . and the New York state housing finance agency is necessary to accomplish such purposes; that the provision of such adequate, safe and sanitary housing accommodations by such companies jointly or severally are public uses and purposes for which public money may be loaned and private property may be acquired by and for such companies and tax exemptions granted . . . .

See also N.Y. PRIV. HOUS. FIN. LAW § 11-a (McKinney Supp. 1971) which provides additional policies and purposes.

56. Instant case at 324, 270 N.E.2d at 327, 321 N.Y.S.2d at 608.

57. *Id. See* Vinson v. Greenburgh Housing Authority, 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (2d Dep't 1968), *aff'd*, 27 N.Y.2d 675, 262 N.E.2d 211, 314 N.Y.S.2d 1 (1970).

amendment.[58] By implying that the over-all project was public, the court inferred that every tenant, low and middle-income, must be provided with the guarantees of the fourteenth amendment. Thus, any corresponding state involvement in a limited-profit housing development must comply with the state action doctrine of the fourteenth amendment.

The consequence of this inference may be perceived as an extension of the state action doctrine to this type project by further diminishing the unconstrained perogatives of the landlord through the requirement that each tenant be guaranteed the protections of the fourteenth amendment.[59] The dissenting opinion, in the instant case, argued that the housing program contemplated the investment of private capital, through state incentives, to aid in the resolution of the current housing problem. "As such, the program is a real expression of State deference to private enterprise and its efforts should not be impeded by grafting upon it, gratuitously, those obligations which are rightfully limited to instances of State action."[60] Implied in this expression is the fear that requiring a limited hearing would place an intolerable burden upon the landlord and defeat the purpose of the statute. To require a hearing would hinder the free contractual rights of a landlord and possibly have a chilling effect on any future private investment. Nevertheless, the court properly disregarded the dissenting argument with the justification that arbitrary summary eviction proceedings arising out of limited-profit housing projects can be a very dangerous weapon, creating rather than solving the problem for which the housing project was established. The declared purpose of the Private Housing Finance Law was

58. The court infers that if a subsequent suit was brought by one of the tenants living in the remaining 80% of the units, there may be found sufficient state involvement to warrant the fourteenth amendment guarantees.

59. A survey of public housing case law will demonstrate the diminution of the unfettered powers of the landlord. *See* Thorpe v. Housing Authority, 386 U.S. 670 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); McGuane v. Chenango Ct. Inc., 431 F.2d 1189 (2d Cir. 1970); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970); Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968); Colon v. Tompkins Square Neighbors, 294 F. Supp. 134 (S.D.N.Y. 1968); Vinson v. Greenburgh Housing Authority, 29 App. Div. 2d 388, 288 N.Y.S.2d 159 (2d Dep't 1968), *aff'd*, 27 N.Y.2d 675, 262 N.E.2d 211, 314 N.Y.S.2d 1 (1970); Johnson v. White Plains Urban Renewal Agency, 65 Misc. 2d 293, 317 N.Y.S.2d 899 (Sup. Ct. 1971); Williams v. White Plains Housing Authority, 62 Misc. 2d 613, 309 N.Y.S.2d 454 (Sup. Ct. 1970); Schoshinski, *Public Landlords and Tenants: A Survey of The Developing Law*, 1969 DUKE L.J. 399; Comment, *Public Landlords and Private Tenants: The Eviction of "Undesirables" from Public Housing Projects*, 77 YALE L.J. 988 (1968).

60. Instant case at 324, 270 N.E.2d at 327, 321 N.Y.S.2d at 608.

not merely to encourage private investors into the housing field, but primarily to provide safe, sanitary and adequate housing accommodations for low and middle income families.[61] The court has given proper warning to all landlords that any corresponding government participation necessitates the due process guarantees.

In the process of determining the existence of state action in the 20% units, the court referred to the fact that the housing project was constructed and managed at moderate cost pursuant to article II of the Private Housing Finance Law,[62] which authorizes the state to mortgage the project by issuing low interest, tax free bonds to the public and to grant the project tax abatements. In addition, the state requires the project to limit its profits by submitting to extensive supervision, which includes a schedule of maximum rental rates, prescribed eviction procedures, and the approval of lease arrangements by the state agency.[63] In light of the indicated governmental participation into the affairs of the project, the private manager has been relegated to the mere task of daily supervision. Obviously, the above state actions were not limited to the 20% units, for the court stated that the "over-all apartment project was State assisted, partially tax-exempt, constructed and operated by a State-supervised, private, limited-profit housing company . . . ."[64] If such is the case, sufficient state participation may be found within the over-all apartment project to establish the project-owner (Ebbets Field Housing Company) as an instrument of the state within the proscription of the fourteenth amendment. Clearly, the court has implied that there was the requisite state action within the whole project, and not only within the 20% units.

Furthermore, the relevancy of the legislative purpose of the housing statute[65] summarized in *Vinson*[66] is equally applicable to the case at bar:

> [O]ur State has distinguished low rent housing as a human need to be satisfied through governmental action and has created

61. N.Y. PRIV. HOUS. FIN. LAW § 11 (McKinney 1962).
62. *Id.* §§ 7-39.
63. *Id.* §§ 20, 22-23, 31-32, 46.
64. Instant case at 317, 270 N.E.2d at 322, 321 N.Y.S.2d at 602.
65. N.Y. PUB. HOUS. LAW § 2 (McKinney 1962). *Compare* N.Y. PRIV. HOUS. FIN. LAW §§ 10-37 (McKinney 1962) *and* N.Y. CONST. art. XVIII.
66. Vinson v. Greenburgh Housing Authority, 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (2d Dep't 1968), *aff'd*, 27 N.Y.2d 675, 262 N.E.2d 211, 314 N.Y.S.2d 1 (1970).

> by specific statutory provisions the structure of the relationship between the housing authority and the tenant.[67]

The nature of the relationship between the landlord, referring to the project manager, and the tenant, is not an ordinary one.[68] A landlord of a limited-profit housing project "is a very special creature of the statute, and is required to comply very strictly with the regulations prescribed . . . ."[69] Thus, the landlord and the tenants are both subject to state regulations as prescribed by the Commissioner. Specifically, any tenant eviction from a limited-profit housing unit must be based upon one of the ten categories prescribed as grounds for termination of tenancy.[70] Therefore, the project manager, because he is acting as both landlord and as an agent of the state is subject to the requirements of due process of law. Thus, even in limited-profit housing, what was once considered "complete freedom of action under private contractual arrangements falls to restricted action"[71] under the state action concept.

In the instant case, the majority merely granted the *state's tenants* a limited hearing, which "does not involve a full evidentiary hearing or the full scope review of administrative quasi-judicial action . . . ."[72] The court reasoned that a limited hearing would meet the test of arbitrariness and at the same time would avoid placing an intolerable burden upon the project owner. Inherent in granting only a limited hearing was the fear that requir-

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67. *Id.* at 340, 288 N.Y.S.2d at 163.

68. Williams v. White Plains Housing Authority, 62 Misc. 2d 613, 616, 309 N.Y.S.2d 454, 458 (Sup. Ct. 1970). "Due to its governmental aspects, the Authority is not the ordinary landlord, nor is the lessee the ordinary tenant . . . . The Authority's interest in property is in its usefulness as a tool of national and State housing policies." *Id.* at 616-17, 309 N.Y.S.2d at 458.

69. Lafayette Morrison Housing, Inc. v. Patterson, 57 Misc. 2d 579, 582, 292 N.Y.S.2d 785, 788 (N.Y.C. Civ. Ct. 1968). *See* 9 N.Y. OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS §§ 1727-3, 1727-4, 1727-5 (1969).

70. According to section 1721-5.3 of the 9 N.Y. OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS, the eviction procedures by a limited-profit housing company require a hearing before the Commissioner of the State Housing Finance Agency.

71. Vinson v. Greenburgh Housing Authority, 29 App. Div. 2d 338, 341, 288 N.Y.S.2d 159, 163 (2d Dep't 1968), *aff'd*, 27 N.Y.2d 675, 262 N.E.2d 211, 314 N.Y.S.2d 1 (1970). *Cf.* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); Housing Authority v. Cordova, 130 Cal. App. 2d 683, 279 P.2d 215 (1955), *cert. denied*, 350 U.S. 969 (1956); Kutcher v. Housing Authority, 20 N.J. 181, 119 A.2d 1 (1955); Peters v. New York City Housing Authority, 1 App. Div. 2d 694, 147 N.Y.S. 2d 859 (2d Dep't 1955); Lawson v. Housing Authority, 270 Wis. 269, 70 N.W.2d 605 (1955).

72. Instant case at 318, 270 N.E.2d at 323, 321 N.Y.S.2d at 603. *See* Colton v. Berman, 21 N.Y.2d 322, 329, 234 N.E.2d 679, 681-82, 287 N.Y.S.2d 647, 650-51 (1967).

ing a full evidentiary administrative hearing would place a restraint upon the owner in obtaining his profit and would discourage future private investment in the housing field. The court in *Williams v. White Plains Housing Authority*,[73] however, believed that providing the "minimal standards of due process to a tenant . . . is in no way imposing an intolerable burden on an authority. A determination prior to eviction is far better than a *de novo* judicial proceeding."[74]

A limited hearing is inadequate to safeguard the rights of the tenants against arbitrary action by the state or the project owner.[75] Allowing the tenants the opportunity to deny or affirm the allegations before the Commissioner or the project owner is not a sufficient safeguard against the abuse of discretion. The Commissioner or the project owner who suggested eviction should not be allowed to judge the merits of the tenant's case. Such a situation would place the Commissioner or the project owner in the roles of both prosecutor and judge—incompatible to the idea of a fair and impartial hearing.

> [D]iscretionary administrative power over individual rights . . . is undesirable *per se*, and should be avoided as far as may be, for discretion is unstandardized power and to lodge in an official such power over person or property is hardly conformable to the 'Rule of Law.'[76]

Tenants of a limited-profit housing project subjected to the state action concept of the fourteenth amendment must be provided with a full administrative hearing. Procedural guidelines for such a hearing in *public housing* units were established in the Second Circuit case of *Escalera v. New York City Housing Authority*.[77] Primarily, a hearing must be conducted before an

73. 62 Misc. 2d 613, 309 N.Y.S.2d 454 (Sup. Ct. 1970).

74. *Id.* at 620, 309 N.Y.S.2d at 461.

75. Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970). *See also*, Goldberg v. Kelly, 397 U.S. 254, 263 (1970):

> Accordingly, as we said in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.'

In analogy to *Goldberg*, the crucial factor is the termination of the Fullers' tenancy prior to a hearing concerning their eligibility. Thus, termination of tenancy pending resolution of the controversy over eligibility may deprive an eligible person a necessity of life—shelter—and his situation becomes immediately desperate.

76. E. FREUND, THE GROWTH OF AMERICAN ADMINISTRATIVE LAW 22-23 (1923).

77. 425 F.2d 853 (2d Cir. 1970). *Cf.* Goldberg v. Kelly, 397 U.S. 254 (1970).

impartial decision maker, whose actions are reviewable by a tenant review board[78] based upon the substantial evidence rule. Only after a final determination by the tenant review board will eviction proceedings commence against the tenant. "If these procedures are followed the review board will maintain and discharge its function as an impartial decision maker and insure to a tenant a full and fair hearing."[79] *Escalera* applied all the guarantees of *Goldberg v. Kelly*[80] to tenants in public housing units. *Escalera* therefore intimates that any deprivation inflicted upon such a tenant, *i.e.*, eviction without any explanation, requires notice and an opportunity to be heard before an impartial decision maker, not merely before the project manager who instituted the proposed action against the tenant. As Professor Lefcoe stated:

> Since . . . the residents of [low-income housing] must be people who have no suitable alternative housing, they are the easy victims of incompetent, corrupt, or callous management. Private tenants in conventional apartments can find other accomodations if they are mistreated or if their buildings are badly constructed or ineptly managed. And because the owners . . . of private apartments are usually eager to avoid . . . vacancies . . . redress of grievances is ordinarily simple to achieve. This is less often the case for tenants in rent-controlled or subsidized housing. Government subsidized housing may be managed more with an eye to satisfying political demands than to keeping tenants happy.[81]

In conclusion, the court has extended, by implication, the concept of state action to the *over-all* limited-profit housing de-

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78. All New York City Public Housing Authorities administer evictions through a tenant review board. A panel of three or more members is usually present at a hearing reviewing the landlord's recommendations for eviction and the tenant's argument for continued occupancy. For a good review of how the tenant review board functions see, Schoshinski, *Public Landlords and Tenants: A Survey of the Developing Law*, 1969 DUKE L.J. 399, 449-54 and Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970) which is involved primarily with the proper functioning of the tenant review board so as to provide all the tenants due process guarantees.

79. Comment, *Public Landlords and Private Tenants: The Eviction of "Undesirables" from Public Housing Projects*, 77 YALE L.J. 988, 1004-05 (1968). *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970); Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970); McMichael v. Chester Housing Authority, 325 F. Supp. 147 (E.D. Pa. 1971); Williams v. White Plains Housing Authority, 62 Misc. 2d 613, 620, 309 N.Y.S.2d 454, 461 (Sup. Ct. 1970).

80. 397 U.S. 254 (1970).

81. Lefcoe, *HUD's Authority to Mandate Tenants' Rights in Public Housing*, 80 YALE L.J. 463, 497 (1971).

velopment. The degree of state involvement into the affairs of the housing project has transformed its representatives into instruments or agents of the state. Eviction of tenants from such a housing project is a very serious injury and "dangerous weapon"[82] thereby necessitating the requisite due process guarantee of an administrative hearing. Such a hearing is applicable to all the tenants living in a limited-profit housing development. "It is not dispositive to maintain that a private landlord might terminate a lease at his pleasure."[83] Here we are dealing with governmental actions that are " 'circumscribed by the Bill of Rights and the Fourteenth Amendment.' "[84]

SAMMY FELDMAN

PRISONER RIGHTS—FEDERAL JURISDICTION, DUE PROCESS, INDEFINITE SOLITARY CONFINEMENT, CENSORSHIP OF MAIL, INMATE LEGAL ASSISTANCE, FREEDOM OF EXPRESSION AND DAMAGES

On June 25, 1968, Martin Sostre was placed in solitary confinement at New York State's Green Haven Prison for alleged violations of prison rules.[1] One year and eight days later, a United States district court ordered his release *pendente lite*.[2] Subsequently, that court decided that Sostre had not been pun-

82. Comment, *Public Landlords and Private Tenants: The Eviction of "Undesirables" from Public Housing Projects*, 77 YALE L.J. 988, 991 (1968).

83. Vinson v. Greenburgh Housing Authority, 29 App. Div. 2d 338, 344, 288 N.Y.S.2d 159, 166 (2d Dep't 1968), *aff'd*, 27 N.Y.2d 675, 262 N.E.2d 211, 314 N.Y.S.2d 1 (1970).

84. *Id.*, *citing* Thorpe v. Housing Authority, 386 U.S. 670, 678 (1967) (Douglas, J., concurring).

1. Sostre had allegedly violated several prison rules by failing to obey all orders "promptly and fully," failing to answer all questions "fully and truthfully," corresponding about restricted matters, and possessing contraband. The contraband consisted of two small pieces of emery paper (a possible escape tool, according to the warden), six tables of contents torn from issues of the *Harvard Law Review* and bearing a stamp identifying these issues as belonging to Sostre (indicating that Sostre was lending his books to other prisoners without first receiving the warden's permission in violation of a prison rule), and a letter which Sostre was admittedly in the process of translating into English for another prisoner.

2. The day after his court-ordered release, Sostre was punished for "having dust on his cell bars." He was confined to his cell for several days and consequently missed the annual 4th of July celebration, the only occasion during the year when all the prisoners were allowed to congregate together. A month after this punishment, he was deprived of certain privileges because of "inflammatory, racist literature" found in his cell. The literature consisted of both magazine and newspaper articles which Sostre had extracted from permitted magazines and personal writings. Topics included quotations from Mao Tse Tung, rules of conduct of the Black Panther Party, and an original article entitled "Revolutionary Thoughts."